Clarence R. Yeager Distributing, Inc. *and* United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its Constituent Locals: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182.[1] Case 28-CA-5578

May 13, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

Upon a charge filed on October 26, 1979, by United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its constituent Locals: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182, herein collectively called the Union, and duly served on Clarence R. Yeager Distributing, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on January 30, 1981,[2] against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5), (3), and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that Respondent is now and has been at all material times a party to an agreement which provides for the recognition of the Union as the exclusive representative of certain of Respondent's employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The complaint further alleges that Respondent violated Section 8(a)(5) and (1) by: (1) repudiating the current collective-bargaining agreement; (2) withdrawing recognition of the Union; and (3) unilaterally changing existing terms and conditions of employment of its employees in the appropriate unit by refusing to abide by the collective-bargaining agreement regarding wage rates, fringe benefit contributions, hiring hall provisions, and submission of monthly reporting forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds.

The complaint also alleges that Respondent's acts and conduct described above violated Section 8(a)(3) and (1), as the acts discriminated in the hire and tenure and terms and conditions of employment of those employees of Respondent who were not union members, thereby discouraging membership in the Union.

Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 30, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 6, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[3]

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause, Respondent repeats the argument, first raised in the representation proceeding, that the 1979-82 contract to which Respondent agreed to be bound by signing memorandum agreements with the Union,[4] constitutes an unenforceable contract which cannot serve as a bar to the RM petition filed in Case 28-RM-379. Further, Respondent contends that the Regional Director erroneously found that the recognition clause of the 1979-82 contract sets forth an appropriate unit.[5] Respondent argues that substantial issues of fact warranting further hearing exist in this case. The General Counsel argues that all material issues have been previously presented to, and decided by, the Board, and that there are no litigable issues of fact requiring a hearing. We agree with the General Counsel.

[1] The name of the Union appears as corrected at the hearing in Case 28-RM-379.

[2] On June 17, 1981, the Regional Director for Region 28 issued an amendment to the complaint.

[3] Chairman Van de Water did not participate in the underlying representation case, 28-RM-379, and is participating here for institutional reasons.

[4] The most recent memorandum agreement was executed by Respondent and the Union under date of January 25, 1977.

[5] Official notice is taken of the record in the representation proceeding, Case 28-RM-379, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Our review of the record herein, including the record in Case 28-RM-379, discloses that the Regional Director for Region 28 issued his Decision and Order on February 12, 1980. In his decision, the Regional Director found Respondent was bound by the 1979-82 collective-bargaining agreement negotiated by the Union and the Associated General Contractors, Arizona Chapter, Associated General Contractors of America, Inc., Arizona Building Chapter (herein Associations). Respondent, in 1977, had signed a memorandum agreement with the Union in which it agreed to be bound by collective-bargaining agreements between the Associations and the Union. Thus, the Regional Director concluded that a valid collective-bargaining agreement existed between Respondent and the Union and said agreement constituted a bar to the election petitioned for in Case 28-RM-379. In so doing, the Regional Director implicitly found that the unit set forth in the collective-bargaining agreement between the Union and the Associations constituted an appropriate unit. Further, in the underlying proceeding, Respondent acknowledged, and the Regional Director found, that Respondent only applied the economic terms of its collective-bargaining agreements to employees who indicated that they were union members. In regard to employees who did not affirmatively state they were union members, Respondent applied a different set of wages and benefits established by it without consultation with the Union. Finding the Union had persisted in its efforts to represent all employees, the Regional Director rejected Respondent's contention that the collective-bargaining agreement was a "members only" contract.

Thereafter, Respondent filed a request for review of the Regional Director's Decision and Order, and the Board, on April 22, 1980, granted the request for review. On September 24, 1980, the Board, with certain modifications, affirmed the Regional Director's Decision and Order and dismissed the petition filed in Case 28-RM-379. On October 6, 1980, Respondent filed a motion for reconsideration and to reopen the record, which was denied by the Board on December 17, 1980.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[7]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is now, and has been at all times material herein, an Arizona corporation with an office and place of business in Phoenix and Tucson, Arizona, where it is presently, and has been at all times material herein, engaged in the business of nonretail sale and installation of garage doors. In the course and conduct of its business operations, Respondent purchases and receives goods and materials valued in excess of $50,000 directly from firms located outside the State of Arizona.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its constituent Locals: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Unit*

Commencing in September 1962, Respondent executed a series of memorandum agreements with the Union providing, *inter alia*, that Respondent would be bound by existing and subsequently negotiated collective-bargaining agreements between the Union and the Associations. The current 1979-82 agreement provides, *inter alia*, for the recognition of the Union as the exclusive collective-bargaining representative of Respondent's installers, service-

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] Inasmuch as the remedy would not be affected by a finding that Respondent's conduct violated Sec. 8(a)(3) as well as 8(a)(5), there is no need to address the General Counsel's allegation that it did. *V M Construction Co., Inc.*, 241 NLRB 584, 587 (1979).

men, and apprentice employees in a unit of employees described in the following manner:

> That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective-bargaining representatives of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such is defined by the Building and Construction Trades Department of the American Federation of Labor–Congress of Industrial Organizations, as of the date of this Agreement, excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics, all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers, except as otherwise herein covered.

The unit of employees described above constitutes a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act.

B. *The Representative Status of the Union*

The Union is now, and has been at all material times, the exclusive representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

C. *The Violations*

Respondent has unilaterally changed existing terms and conditions of employment of its employees in the unit described above, has repudiated the collective-bargaining process, and has unilaterally withdrawn recognition of the Union by refusing to abide by the collective-bargaining agreement regarding wage rates, fringe benefit contributions, hiring hall provisions, and submission of monthly reporting forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds. Further, Respondent has failed and refused to apply the terms and conditions of the collective-bargaining agreement to nonmembers of the Union.

Accordingly, we find that, by the aforesaid conduct, Respondent has failed and refused, and is now failing and refusing, to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit. By such conduct, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Such affirmative action shall include that Respondent recognize and deal with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit by honoring the collective-bargaining agreement, terms of which run from June 1, 1979, to May 31, 1982, in all its terms.

Additionally, we have found that Respondent has made unilateral changes in certain terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act. In order to dissipate the effect of these unfair labor practices, we shall order Respondent to make whole its employees by making the required fringe benefit contributions[8] and paying the wage rates as set forth in the collective-bargaining agreement, plus interest, that it has failed to pay since April 27, 1979, as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[9] We shall also order Respondent to comply with the hiring hall provisions of the collective-bargaining agreement[10] and submit the necessary forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Clarence Yeager Distributing, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its constituent Locals: 906, 1061, 1089,

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[8] Fringe benefit contributions shall be computed in the manner set forth in *Merryweather Optical Company*, 240 NLRB 1213 (1979).

[9] See *Ogle Protection Service, Inc., and James J. Ogle*, 183 NLRB 682 (1970). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[10] If there are employees who were denied an opportunity to work for Respondent because of the latter's refusal to abide by its collective-bargaining agreement with the Union, the make-whole order herein shall encompass them. A determination as to whether or not such employees exists is best left to the compliance stage of this proceeding. *Wayne Electric, Inc.*, 226 NLRB 409 (1976).

1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent at all material times has been, and is now, signatory to an agreement providing, *inter alia*, that Respondent would be bound by existing and subsequently negotiated collective-bargaining agreements between the Union and the Associations.

The current 1979–82 agreement provides, *inter alia*, for the recognition by Respondent of the Union as the exclusive collective-bargaining representative of Respondent's installers, servicemen, and apprentice employees in a unit of employees appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act. The agreement describes the unit in the following manner:

> That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective-bargaining representatives of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such is defined by the Building and Construction Trades Department of the American Federation of Labor–Congress of Industrial Organizations, as of the date of this Agreement, excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics, all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers, except as otherwise herein covered.

4. At all times material herein, the above-named labor organization has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally failing and refusing to abide by the collective-bargaining agreement regarding wage rates, fringe benefit contributions, hiring hall provisions, and submission of monthly reporting forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Clarence R. Yeager Distributing, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its constituent Locals: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182, as the exclusive bargaining representative of its employees in the following appropriate unit:

> Respondent's installers, servicemen, and apprentice employees in a unit of employees described in the following manner:
>
> That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective-bargaining representatives of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such is defined by the Building and Construction Trades Department of the American Federation of Labor–Congress of Industrial Organizations, as of the date of this Agreement, excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics, all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers, except as otherwise herein covered.

(b) Failing and refusing to abide by the collective-bargaining agreement regarding wage rates, fringe benefit contributions, hiring hall provisions, and submission of monthly reporting forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Recognize and bargain upon request with the Unions as the exclusive representative of its employees in the aforesaid appropriate unit and honor and abide by the collective-bargaining agreement, terms of which run from June 1, 1979, to May 31, 1982, in all its terms, including the hiring hall provisions.

(b) Make whole its employees, in the manner set forth in the section of this Decision entitled "The Remedy," by making the required fringe benefit contributions and by paying to employees wage

rates, with interest, all as required by its collective-bargaining agreement with the Union, that it has failed to pay since April 27, 1979.

(c) Submit the necessary forms to the Arizona health, welfare, pension, vacation, and apprenticeship fund.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money due under the terms of this Order.

(e) Post at its Phoenix and Tucson, Arizona, places of business copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its constituent Locals: 906, 1060, 1089, 1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182, as the exclusive representative of our employees in the following appropriate unit:

The Employer's installers, servicemen, and apprentice employees in a unit of employees described in the following manner:

That the Contractors hereby recognize the Unions who are signatory hereto as the sole and exclusive collective-bargaining representatives of all employees of the Contractors signatory hereto over whom the Unions have jurisdiction, as such is defined by the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations, as of the date of this Agreement, excluding executives, superintendents, assistant superintendents, civil engineers and their helpers, master mechanics, all supervisory employees such as general foremen, timekeepers, messenger boys, and office workers, except as otherwise herein covered.

WE WILL NOT unilaterally change existing terms and conditions of employment of our employees in the above-described unit by failing and refusing to abide by the collective-bargaining agreement regarding wage rates, fringe benefit contributions, hiring hall provisions, and submission of monthly reporting forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain upon request with the Union as the exclusive representative of our employees in the above-described unit and honor the collective-bargaining agreement, terms of which run from June 1, 1979, to May 31, 1982, in all its terms, including the hiring hall provisions.

WE WILL make whole our employees by making the required fringe benefit contributions and by paying to employees wage rates, with interest, all as required by our collective-bargaining agreement with the Union, which we have failed to pay since April 27, 1979.

WE WILL submit the necessary forms to the Arizona health, welfare, pension, vacation, and apprenticeship funds.

CLARENCE YEAGER DISTRIBUTING, INC.